In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2007

QUICK SHOP MARKETS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On March 15, 1974, the court of appeals entered an order (App., *infra,* pp. 7-9), pursuant to its Rule 14,[1] which enforced the Board's decision and order (Pet. App. 24-36). On April 1, 1974, the court denied petitioner's request for rehearing (App., *infra,* p. 10), and on April 9 it denied petitioner's request for a stay of mandate

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[1]Rule 14 captioned, "Affirmed or Enforced Without Opinion," provides in pertinent part:

> When the Court determines * * * that the order of an administrative agency is supported by substantial evidence on the record as a whole * * * and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

(App., *infra,* p. 11).[2] On April 11, 1974, the clerk of the court of appeals sent petitioner a "certified copy of judgment," enclosing the order of March 15, with a bill of costs attached (Pet. App. 21-23). The petition for a writ of certiorari was filed on July 10, 1974. It states that the judgment of the court of appeals was entered on April 11, 1974 (Pet. 2).

On July 11, 1974, because the Clerk of this Court had questioned the judgment date specified in the petition, petitioner requested the court of appeals to vacate its earlier judgment and substitute a new one. It asserted that there was confusion over whether March 15 or April 11 was the operative date of judgment for purposes of certiorari, and that it had acted in reliance on the Clerk's prior assurance that it was April 11. The court of appeals granted the motion and entered a new order as of July 19, 1974, identical to the one entered on March 15 (App., *infra,* pp. 12-13).

On September 4, 1974, the court of appeals vacated its order of July 19, stating that "a decision of this court pursuant to Rule 14 [n. 1, *supra*] shall be considered an 'opinion' demanding the requirements of Fed. R. App. P. 19."[3] It directed the parties to "comply with Fed. R. App. P. 19," adding that "the court shall enter judgment thereafter." (Supp. Memo to Pet. 8-9.) On September 26, 1974, the court entered petitioner's proposed judgment (*id.* at 10-14).

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[2]On April 19, 1974, Mr. Justice Blackmun also denied a stay of mandate.

[3]Rule 19 of the Federal Rules of Appellate Procedure provides:

> When an opinion of the court is filed directing the entry of a judgment enforcing in whole or in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment

The court of appeals has now made clear that the order of March 15, 1974 is the equivalent of an opinion and that judgment was not entered until September 26, 1974. Accordingly, there would appear to be no jurisdictional bar to treating the petition for a writ of certiorari, which was filed on July 11, 1974, as having been filed as of September 26, 1974, in which event the petition would be timely.

2. The petition presents no issues warranting review by this Court. Petitioner's basic contention is that the Board improperly declined to set aside a representation election, which the Union (Retail Store Employees' Union Local No. 655) won by a vote of 99-90 (Pet. App. 58), because the Union had paid six employees $15 each to act as its election observers. The facts relevant to this issue, as developed at a hearing before a Board hearing officer, are as follows:

(a) The union paid six employees $15 each for four and one-half hours' work as election observers (Pet. App. 47). One of the observers did not know how much he would be paid until after the election (A. 107-108).[4] Three were told that the $15 was for their services. Two others were told that $15 represented the Union scale for four and one-half hours' work (A. 136, 161). The five observers who

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in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion he shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which he deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

[4] "A." refers to the appendix filed in the court of appeals, a copy of which has been lodged with the Clerk.

testified on the issue stated that their votes were not influenced by the payments (A. 96, 110, 121, 131, 140). One of them further testified that the Union expressly told him the payment should not influence his vote (A. 120). The observers' regular company pay was between $1.60 and $1.75 an hour (Pet. App. 48, 49, 50; A. 92, 105, 114, 126, 134).

The hearing officer concluded that the payments did not impair employee free choice in the election, since none of the observers considered the payments as inducements to vote for the Union, and the payments were not so grossly disproportionate that they were likely to have that effect (Pet. App. 52).

The Board (Chairman Miller dissenting) upheld the hearing officer, stating (Pet. App. 41-42):

> Our dissenting colleague finds objectionable any payments to an observer greater than his normal rate of pay plus expenses. Because an observer is not, as an observer, doing what he usually does, there is no logical basis for saying the two jobs must be paid at the same rate. This is not to say that there is no relationship between the two and we see no reason not to compare them to decide whether there is so gross a disproportion as to establish a taint * * *. [T]he question, like many questions in the law, is one of degree, and this Board constantly makes judgments on such questions.

> We find that the $15 payments, although approximately twice the observer's usual pay for 4½ hours when engaged in their customary duties for the employer, were not so grossly disproportionate to their usual pay rate or to what the Union could reasonably consider was the value of their 4½ hours work as observers; * * *.[5]

The court of appeals sustained the Board (Pet. App. 22).

(b) Contrary to petitioner's contention (Pet. 11), the decision of the court of appeals does not conflict with *Collins & Aikman Corp.* v. *National Labor Relations Board*, 383 F. 2d 722 (C.A. 4). There is no disagreement over the applicable standard regarding permissible payments to election observers; payments which are "unreasonable or excessive" *(id.* at 729) are prohibited. In *Collins & Aikman*, a promised payment seven times in excess of the employee's actual pay for 1½ hour's work was found to be "unreasonable or excessive," where the employee had previously refused to serve as the union's

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[5]The Board rejected the Company's additional contention that the statement made to two observers that $15 was the Union scale was a deliberate attempt to mislead them as to the wages they would enjoy if the Union prevailed. It found that, even assuming the truth of the allegation, the votes of the two observers would not have affected the outcome of the election (Pet. App. 42).

observer. In contrast, here the payments were approximately twice the employees' actual wages for 4½ hours' work and were made in an atmosphere free of coercion.[6]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

OCTOBER 1974.

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[6] The remaining issues raised by petitioner (Pet. 12-19) likewise do not merit review by this Court. The cases cited by the petitioner do not demonstrate a conflict between the decision of the court below and other circuits, but only that the application of what are undisputedly well settled standards may result in different conclusions depending upon the facts of each particular case. Thus, there is no disagreement by the Board or the court below with the proposition that "[m]aterial wage misrepresentations, where the employer has no adequate opportunity to reply, preclude freedom of choice in an election" (Pet. 13). Here, however, the Board's Regional Director found that the Company had adequate opportunity to reply to the leaflet which, in any case, did not contain a material misrepresentation (Pet. App. 65). Similarly, contrary to petitioner's argument (Pet. 14), the Director found no evidence of "brutish conduct" by Union representatives and found the electioneering to be sufficiently distant from the actual voting area to accord with established criteria (Pet. App. 62). Finally, since the Director accepted the facts alleged by petitioner as true in concluding that they did not "provide a basis to set aside the election" (Pet. App. 62, 64, 65, 67), an evidentiary hearing on issues other than the payments to the observers would have been a "senseless and useless formality." *National Labor Relations Board* v. *Sauk Valley Mfg. Co., Inc.*, 486 F. 2d 1127, 1133 (C.A. 9).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ST. LOUIS, MO. 63101
MARCH 15, 1974

ROBERT C. TUCKER, *Clerk* *14-CA-7197*

Re: No. 73-1699. *NLRB* v. *Quick Shop Markets, Inc.*

Dear Sirs:

Enclosed herewith to each of you is copy of order of this Court entered by us today in the above case.

Very truly yours,

Robert C. Tucker,
Clerk

eh
enc.

P.S. Kindly forward to us receipted itemized statement of the cost of printing 10 copies of appendix and 25 copies of petitioner's brief in order that proper taxation of costs may be made.

14 CA-7197

No. 73-1699

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

AND

RETAIL STORE EMPLOYEES UNION, LOCAL 655, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, INTERVENOR,

v.

QUICK SHOP MARKETS, INC., RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUBMITTED: MARCH 11, 1974

FILED: MARCH 15, 1974

Before GIBSON, BRIGHT, AND STEPHENSON, Circuit Judges.

ORDER OF ENFORCEMENT

The National Labor Relations Board petitions this court for enforcement of its order issued on July 23, 1973, against respondent Quick Shop Markets, Inc. (the Company) and reported at 204 NLRB No. 151. The order requires the Company to bargain collectively with the Retail Store Employees' Union, Local No. 655, of the Retail Clerks International Association, AFL-CIO, and to post appropriate notices.

The Company filed timely objections to a representation election won by the Union and alleged that the Union excessively paid employee-election observers in order to influence their votes, that the Union unlawfully engaged in electioneering in the voting area, that the Union kept a tally of the employees who voted, and that the Union misrepresented Union wages in campaign literature. The Company's objections were overruled in their entirety and the Union was certified by the Regional Director, whose decision was first upheld by the Board in its Decision on Review published at 200 NLRB No. 121, with Chairman Miller dissenting.

The Company's objection to the election regarding the payment of $15.00 to employee-election observers for four and one-half hours of work at the polls provides in principle an arguable legal issue. We, however, accede to the Board's finding that these payments do not provide a valid objection to the election, and the facts and circumstances of this case do not warrant additional explication of the developing law on this somewhat troublesome issue. We have also reviewed the Company's other objections to the election and conclude that there is substantial evidence on the record as a whole to support the Board's decision. Board's order enforced. See Rule 14 of this court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

No. 73-1699

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

QUICK SHOP MARKETS, INC., RESPONDENT

RETAIL STORE EMPLOYEES' UNION LOCAL 655, INTERVENOR

ON APPLICATION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The Court having considered petition for rehearing *en banc* filed by counsel for respondent and, being fully advised in the premises, it is ordered that the petition for rehearing *en banc* be, and it is hereby, denied.

Considering the petition for rehearing *en banc* as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

APRIL 1, 1974

No. 73-1699

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

QUICK SHOP MARKETS, INC., RESPONDENT.

RETAIL STORE EMPLOYEES' UNION LOCAL 655, INTERVENOR.

ON APPLICATION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Motion of respondent for stay of issuance of the mandate of this Court having been considered, it is now here ordered by the Court that the motion be, and it is hereby, denied.

APRIL 9, 1974

July 19, 1974

Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
Washington, D.C.

Re: No. 73-1699. N.L.R.B. *v.* Quick Shop Markets, Inc.

Dear Sir:

We enclose for your information and file certified copy of order of this Court entered today vacating and setting aside judgment (order of enforcement) heretofore entered on March 15, 1974 and for the entry of new judgment as of this date, certified copy of which is also enclosed. The order vacating and setting aside the order of enforcement of March 15 is entered after consideration by this Court of motion filed by Mr. Richard L. Barnes, 124 East Fourth Street, Tulsa, Oklahoma. Certified transcript of proceedings in this Court was prepared pursuant to request of Mr. Barnes and sent to your office on June 21, 1974 for use in consideration of petition for certiorari, your number 73-2007.

Very truly yours,

Robert C. Tucker, Clerk

By: Walter F. Grueninger
Chief Deputy Clerk

WFG/mm
Encl.

cc: Mr. Richard L. Barnes

No. 73-1699

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

QUICK SHOP MARKETS, INC., RESPONDENT.

APPLICATION FOR ENFORCEMENT OF ORDER OF NATIONAL LABOR RELATIONS BOARD

This Court having considered the motion of the respondent to vacate order of enforcement of this Court heretofore entered in this cause on March 15, 1974, it is now here ordered that the motion to vacate and set aside the order of enforcement heretofore entered be granted, and that new order of enforcement be entered this date in the same substance as heretofore entered.

JULY 19, 1974